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Rudolph A. Telscher, Jr.*
rudy.telscher@huschblackwell.com
Kara R. Fussner*
kara.fussner@huschblackwell.com
HUSCH BLACKWELL LLP
190 Carondelet Plaza, Suite 600
St. Louis, MO 63105
314-480-1500 Telephone

Ryan B. Hauer*
ryan.hauer@huschblackwell.com
David E. Anderson*
david.anderson@huschblackwell.com
HUSCH BLACKWELL LLP
120 South Riverside Plaza Suite 2200
Chicago, IL 60606
312-655-1500 Telephone

David Stauss*
david.stauss@huschblackwell.com
Dustin L. Taylor*
dustin.taylor@huschblackwell.com
HUSCH BLACKWELL LLP
180 1 Wewatta Street, Suite 1000
Denver, CO 80202
303-749-7200 Telephone
*admitted *pro hac vice*

Stephen P. Bosco*
stephen.bosco@huschblackwell.com
HUSCH BLACKWELL LLP
750 17th Street, NW, Suite 900
Washington, DC 20006
202-378-2300 Telephone

Karl Kronenberger (CA Bar No. 226112)
karl@krinternetlaw.com
Jeffrey M. Rosenfeld (CA Bar No. 222187)
jeff@krinternetlaw.com
KRONENBERGER ROSENFELD, LLP
150 Post Street, Suite 520
San Francisco, CA 94108
415-955-1155 Telephone
415-955-1158 Facsimile

Attorneys for Defendants/Counterclaim Plaintiffs BrandTotal, Ltd. and Unimania, Inc.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO/OAKLAND DIVISION

META PLATFORMS, INC., a Delaware corporation,

Plaintiff/Counterclaim Defendant,

v.

BRANDTOTAL, LTD., an Israeli corporation, and UNIMANIA, INC., a Delaware corporation,

Defendants/Counterclaim Plaintiffs.

Case No.: 3:20-CV-07182-JCS

BRANDTOTAL'S OPPOSITION TO META PLATFORMS' MOTION FOR PARTIAL SUMMARY JUDGMENT

Judge: The Hon. Joseph C. Spero
Ctrm.: Courtroom F – 15th Floor
Date: April 29, 2022
Time: 9:30 A.M.

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I. INTRODUCTION & STATEMENT OF ISSUES

The core legal and policy issues in this case have never been clearer. Meta's position is that it has an absolute, unfettered right to use its Terms of Service and the CFAA to foreclose not only (1) all automated collection of data from any part of its platforms—regardless of whether the data is otherwise public or whether the collection is user-authorized—but also (2) all automated collection of data from user' computers, regardless of whether the collection is user-authorized. Not only that, but Meta claims it can do so with impunity even if the only "harm" it experienced from the collection are the costs generated by its own enforcement efforts. This is wrong as matter of law, policy, and fundamental fairness.

First, Meta's claim that it entitled to summary judgment on its breach of contract claim fails at the outset because its Terms of Service ("ToS") are unenforceable. As explained in BrandTotal's summary judgment brief and further discussed below, enforcement of the ToS in the manner Meta seeks would subvert core public policy interests in user autonomy, competition in the data analytics market, and the free flow of information. Meta's brief does not meaningfully engage with these issues—even though they have been central to the case from the outset—and Meta has notably backed away from its prior argument that enforcement against BrandTotal was necessary to comply with its FTC obligations. Meta's request for summary judgment should also be denied because it has failed to establish the existence of cognizable damages, and because of contested facts about BrandTotal's data collection.

Second, Meta's request for judgment on its CFAA, CDAFA and UCL claims should be denied because they hinge on an extreme interpretation of these statutes that would allow Meta to use them to regulate data collection outside of computer systems it controls—a result that is contrary to Ninth Circuit and Supreme Court case law. At a minimum, disputed facts about technical aspects of BrandTotal's collection preclude summary judgment.

Third, Meta's contention that it's entitled to judgment on BrandTotal's counterclaims fails both because it hinges on argument that BrandTotal's collection activities are unlawful in the first instance—they are not—and because it impermissibly seeks to deprive the jury of the

opportunity to decide contested factual issues related to Meta's efforts to induce Google to remove BrandTotal's products from its platform, and the resulting harm from that action.

II. STATEMENT OF FACTS

A. Meta Never Grants "Permission" for Automatic Collection Outside Its APIs

Meta's Terms of Service ("ToS") for the Facebook platform provide that anyone who agrees to the ToS cannot collect data using automated means without Meta's permission. Ex. 5[1]; Dkt. 272 at 3. Similarly, Section VII of Meta's consent judgment with the Federal Trade Commission ("FTC") mandates a "privacy program" under which an entity that accesses Covered Information from Meta "for use in an independent, third-party consumer application or website" must self-certify compliance with Meta's platform terms and identify the purpose(s) or use(s) for each Covered Information to which it requests or continues to have access. Dkt. 161-5. Under this system, Meta must monitor third-party compliance with its terms "through measures including, but not limited to, ongoing manual reviews and automated scans, and regular assessments, audits, or other technical and operational testing at least once every twelve (12) months." *Id*. at 9. Despite these programs that envision a review process and the ability for third parties to obtain information, [redacted]

Much of the information on Meta's platforms is public. Information Meta contends belongs to advertisers on Meta's platforms is the same information advertisers have recognized is public for decades. Ex. M at § VI.A. This information is commonly publicly accessible by simply driving down the highway (billboards), picking up a magazine (print), or turning on the TV or radio (TV/radio spots). *Id*.[2] Meta places this otherwise-public information behind the "walled garden" of its sites and declares it to be Meta's property. BrandTotal's Panelists, who are users of Facebook and/or Instagram, agree to share information with BrandTotal, including their

[1] Citations to Ex. 1, 2, 3, etc. refer to exhibits to Meta's brief in support of its Motion for Partial Summary Judgment. Dkt. 272. Citations to Ex. A, B, C, etc. refer to exhibits to the Declaration of Dustin L. Taylor in Support of BrandTotal's Opposition.

[2] Although Meta's expert, Dr. Thaw, claimed that it was the order in which the advertisements appeared in the news feed that was proprietary, Ex. L, 107:4–109:5, this is no different than the order of ads in a magazine or on tv.

demographic information (UpVoice (Legacy), Phoenix, and Social One) and information about the advertisements they are shown (all applications/extensions, including UpVoice (2021)). Ex. 20. Meta prohibits its users from sharing this information under the guise of "sharing their account." Ex. 80, Response to ROG No. 21. Meta even takes steps to block access to portions of its website that are *not* part of a users' feed. For example, for portions of its website that are not password protected, such as the advertisement-URL, if Meta detects that a computer is requesting to access the advertisement-URL, it requires entry of a password when one is otherwise not required. Ex. 1 at § 4.13.4. [redacted] Ex. A, 81:11-82:4, 84:20-85:23.[3]

B. BrandTotal Carefully Designed Its Applications and Extensions to Collect Only What Users Agreed to Share and to Protect That Information

BrandTotal has been collecting data from the Facebook and other on-line social media sites since April 2018. Ex. J, 274:4–9; Ex. 1, ¶ 604. Throughout this time, BrandTotal has diligently worked to protect the privacy of its users and the data that it collects. It worked to comply with GDPR and CCPA requirements and promoted this compliance when pitching new business. Ex. Q at BT0049263 ("partnering with an EU GDPR representative"); Ex. R at BT0069904. It also transmitted data securely over a HTTPS connection. Ex. J, 144:12–145:14.

BrandTotal has also diligently and quickly addressed any data security issues of which it became aware. BrandTotal upgraded its hashing function that is used to encrypt transmitted information by changing from a static to a random salt in response to an *AdGuard* article in 2018. Ex. C, 148:10–13, 151:9–14; Ex. J, 119:17–121:4. BrandTotal implemented a secondary consent notification that asks Panelists to opt-in each time the Panelist uses UpVoice (2021) with a new account. Ex. 20, ¶¶ 34–36. BrandTotal maintains that such a secondary opt-in notice was not required because its extensions and applications operated on the Chrome browser and Android applications, respectively, both of which are user-profile specific. Indeed, the use of such an opt-in notification each time a new account is used is contrary to the industry standard. Google Chrome saves passwords (including to bank accounts), without this opt-in safeguard. Ex. GG. Meta itself

[3] Meta also specifically blocked IP addresses associated with BrandTotal. Dkt. 272 at 5.

allows a user to access whatever account was last logged-in or to switch accounts on the shared computer. Ex. HH. Regardless, to address concerns stated by Meta and this Court *after* the litigation began, BrandTotal implemented this feature. BrandTotal also corrected a "logger" functionality that transmitted user information to a BrandTotal resource that was accessible only by BrandTotal's developmental team for use in troubleshooting BrandTotal's software. Ex. J, 172:20–174:16. This functionality was present in code for four months and removed by BrandTotal. *Id.*; *see also* Ex. 1 at ¶¶ 458, 460. Although Meta argues BrandTotal made these changes only after the risks were brought to BrandTotal's attention, Dkt. 272 at 5–7, it ignores that software companies (including Meta) often have bugs that present unintentional risks and are corrected once the issue is brought to their attention. *See* Ex. FF (discussing history of Meta security breaches, many of which were due to "bugs" or the actions of Meta employees, such as storing as many as 600 million Facebook user passwords in plaintext files).

In early 2021, BrandTotal redesigned and launched its flagship UpVoice program. Later that year, BrandTotal also modified its "backend" or "server side" collection software and launched a new extension, to which the parties refer as the "Restricted Panel Extension" ("RPE"), that followed the same guidelines as UpVoice (2021). Ex. J, 108:17–109:3, 137:22–138:5, 139:9–140:19. Collectively these revisions address many of the criticisms Meta has made during this litigation (despite not previously bringing them to BrandTotal's attention).

UpVoice (2021) does not make any calls to Meta servers. Ex. 1 at ¶ 472; *see also* Ex. F, 97:6–18. It exfiltrates only limited information relating to the advertisements the user has seen. Ex. 1, ¶¶ 491–496. It does not collect any user-demographic information from Meta and instead uses information the panelist provided during the sign-up and qualification process. *Id.* at ¶ 494. As noted above, UpVoice (2021) also utilizes a secondary opt-in requirement, even after the panelist has gone through BrandTotal's qualification process. Ex. 20 at ¶¶ 34–36. Before BrandTotal began allowing panelists to share their Facebook data via UpVoice (2021), BrandTotal sought Meta's permission to collect data via automated means. Exs. J–K to Dkt. 183. Meta refused. *Id.*

BrandTotal also modified its backend code. BrandTotal's backend code used the creative

ID that panelists shared with BrandTotal via the UpVoice (2021) or other applications/extensions to visit the advertisement-URL. Ex. 20, ¶¶ 53–55. In the vast majority of instances, the information is accessible without requiring the entry of a username or password. Ex. K, 155:10–156:5.[4] In some limited instances, however, the advertisement-URL may be limited because the content of the advertisement is restricted (such as alcohol). Ex. 1, ¶¶ 222–229. [redacted] Ex. K, 109:10–112:12. [redacted] Ex. 14, 51:2–17. [redacted] Ex. K, 109:16–110:3, 143:14–18. [redacted] *Id.* at 135:8–138:5. Like UpVoice (2021), RPE exfiltrates and sends to BrandTotal information that the panelist sees without making requests to Meta-controlled servers. *Id.* at 137:22–140:19. The RPE collects the same information BrandTotal's backend collects from non-password protected URLS. *Id.*; *see also* Ex. 23, ¶¶ 13, 18.

C. Investigations into BrandTotal

Meta's internal documents show that Meta was not only aware of BrandTotal's data collection since at least April 2018 but had also "investigated" BrandTotal and its software shortly thereafter. Ex. O, Response to RFA No. 12. [redacted] Ex. T at FB_BRTL_00014655 [redacted] Ex. 40 at FB_BRTL_28694 [redacted]; *id.* at 28703 [redacted]

[4] Although Meta also employs "lockout" mechanisms when it detects the entity trying to access the advertisement URL is not human, it does not require a password for the same URL if a human visits the URL. Ex. F, 120:11–22.

[5] *See* Ex. EE at i (discussing use of fake accounts with Facebook).

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[redacted] Ex. S at FB_BRTL_00000053 [redacted] (Dkt. 42 at ¶ 4), [redacted] Dkt. 205 at 3.

Meta's investigation further shows that Meta [redacted] Ex. W at FB_BRTL_00025146. Documents Meta produced from its investigation into BrandTotal also show Meta knew of BrandTotal and its relationships with specific customers. *See* Ex. X; Ex. Y; Ex. Z. Meta often engaged in communications with BrandTotal and its customers. Ex. AA. Companies that were both advertisers on Facebook.com and BrandTotal customers asked Meta about BrandTotal. For example, on September 22, 2020, BrandTotal customer and Facebook-advertiser FCA's advertising agency asked Meta to send any "watch outs they should be aware of now that the clients are using" BrandTotal. Ex. U. Meta employees found BrandTotal "intriguing. At least for us to understand methodology so we can be prepared to address these reports and even better, potentially to engage in a partnership with Brand Total [sic] to proactively bring insights for marketers." *Id*. Moreover, these internal documents show that [redacted] Ex. BB at FB_BRTL_00028738 [redacted] On September 24, 2020, Ms. Stephanie Elise Dailey contacted Mr. Karve, who was on the team responsible for investigating BrandTotal, asking for information about BrandTotal/UpVoice because "they've had several advertiser partners asking our sales team for their POV on it's capabilities." Ex. V at FB_BRTL_00019356. Mr. Karve responded "[w]e're enforcing on them this week." *Id*.

As part of Meta's "enforcement plan" against BrandTotal, Meta planned to [redacted]

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[redacted] FB_BRTL_00028723 at 726 [redacted] . Ex. T at FB_BRTL_00014657 [redacted] Ex W at FB_BRTL_00025146 [redacted] On Monday, September 21, 2020, Jeremy Brewer, a Meta employee, emailed a contact at Google, Ben Ackerman. Ex. 34 at FB_BRTL_00016961. Mr. Brewer represented that Meta had "found some Chrome extensions we believe are improperly scraping user PII (e.g., gender, relationship status, ad interests, etc.) without proper disclosure." *Id*. Another Meta employee, Sanchit Karve, also emailed Mr. Ackerman that same day and stated that "[t]he extensions Jeremy mentioned [UpVoice and AdsFeed] are closely related behaviorally to five extensions created by another developer (OinkAndStuff) that have been removed recently." *Id*. at 960–961. When Mr. Ackerman did not respond, Meta's Mr. Karve emailed him again on September 25[6] asking "if you've had a chance to look into our request." *Id*. at 960. The following Tuesday, Google's Mr. Ackerman responded "Ah . . . I'm familiar with them, I will get the three that are live looked at." *Id*.

[redacted]

[6] This is the day after Mr. Karve was asked to share information about BrandTotal/UpVoice with Meta's sales team in response to several advertiser partners asking the sales team for their POV on its capabilities. Ex. V at FB_BRTL_00019356.

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[redacted]

[redacted]

[redacted]

In addition to going through Google to have the extensions removed from the Chrome Store, Meta also took "technical measures" against BrandTotal by terminating not only the business pages of BrandTotal but also the personal pages of its principals. Ex. D, 127:12–128:16, 129:11–15. [redacted]. *Id.* at 137:17–24. [redacted] Ex. I, 33:24-34:16, 64:7-65:8.

D. Meta's Conduct Directly Caused BrandTotal Severe Harm

BrandTotal provides advertising analytics services. BrandTotal's value proposition is its 'ability to aggregate the publicly available information,' including the information seen in users'

[7] [redacted]

social feed, but that would otherwise be difficult to access 'because of the volume of data and the myriad of platforms that are available.'" Ex. M at ¶ 81 (citing Mansfield Dep. Tr. (Ex. E), 12:6–19). BrandTotal provides several services to its customers, including [redacted]. *Id.* at ¶¶ 100, 103; Ex. E, 81:7–16. [redacted] Ex. M, ¶ 104. To provide these services, BrandTotal collects data not only from Facebook and Instagram, but also from Twitter, YouTube, LinkedIn, and also from non-social channels Amazon and display banners. *Id.* at ¶ 84. [redacted] Ex. H, 154:7–17, 182:21–183:3.

BrandTotal's UpVoice product allows Panelists to share data from multiple social media platforms. Ex. 1 at 24–27. [redacted]. Dkt. 125, Dor Decl., ¶ 13; *see also* Ex. J, 282:2–8 (stating mobile collection from Phoenix and Social One is very low). BrandTotal had previously lost the ability to control applications and extensions that had been removed from the Google Chrome and Play Store. Ex. 22 at 95:15–18.

The UpVoice (Legacy) extension was removed from the Google Chrome Store on October 1, 2020. Dkt. 148, ¶ 72. BrandTotal immediately lost its ability to not only receive data from Panelists, but to provide Panelists with the gift cards they had already earned. Dkt. 26-5, ¶ 26. BrandTotal lost its ability to receive Panelist-shared information across all channels, not just Facebook and Instagram. Ex. H, 179:10–20. This severely compromised BrandTotal's ability to provide its advertising analytics services, due to the lack of robust, reliable data. *Id.* at 154:7–17, 182:21–183:3. To address its inability to provide these services, BrandTotal [redacted]. *Id.* at 159:9–160:16. [redacted]. *Id.* at 162:16–163:20.

[redacted]. *Id.* at 159:15–160:16. Despite these efforts, some customers ended their relationship with BrandTotal. *See e.g.*, *id.* at 99:4–100:10, 103:8–23.

III. ARGUMENT

A. Meta is Not Entitled to Summary Judgment on Its Breach of Contract Claim

As BrandTotal explained in its motion for partial summary judgment—the relevant portions of which BrandTotal incorporates by reference—Meta's terms of service are unenforceable for two independent reasons—they are both contrary to public policy and unconscionable.[8] Judgment in BrandTotal's favor on either theory disposes of Meta's motion as to is breach of contract count. Further, Meta's damages theories are fatally flawed and do not support a finding that Meta has experienced harm because of BrandTotal's alleged breach —a necessary element of Meta's breach of contract claim. For at least these reasons, Meta's request for summary judgment as to its breach of contract claim should be denied.

1. Meta's Terms of Service Are Unenforceable

In its motion for summary judgment, BrandTotal explained at length why Meta's ToS are unenforceable under the unconscionability doctrine and as contrary to three powerful public policy goals: (1) promotion of user control over online data, (2) promotion of competition in the market for advertising analytics, and (3) promotion of the free flow of information online. Nothing in the truncated section of Meta's summary judgment brief dedicated to unenforceability challenges these conclusions. Indeed, Meta does not fully engage with public policy arguments that BrandTotal already made in prior filings, much less the arguments in BrandTotal's summary judgment brief. Instead, Meta caricatures BrandTotal's arguments and ignores key evidence.

Meta's first argument against unenforceability is that, because of the countervailing public interest in enforcing contracts, "[i]n the absence of any clear legislative guidance, this court should

[8] *See* Dkt. 268 at 1-33. To narrow and simplify the issues before the Court, BrandTotal sought summary judgment with respect to Meta's breach of contract claim as to BrandTotal's flagship UpVoice (2021) product and related server-side collection. However, the public policy and unconscionability arguments underlying BrandTotal's summary judgment motion apply more broadly and render Meta's ToS wholly unenforceable as to BrandTotal.

not hold that anti-scraping provisions like Meta's are void for public policy." Dkt. 272 at 14. Putting aside Meta's reflexive and inaccurate use of the term "scraping," there ***is*** clear legislative guidance. The text and legislative history of the CCPA reflects the strong public interest in user control over online data—a goal that the Section 3.2.3 automated collection ban frustrates. *See* TRO Brief at 2, 11-13. And as set forth in BrandTotal's summary judgment brief, the people of California amplified that guidance in the soon-to-be-effective CPRA. Dkt. 268 at 15-18. Meta simply ignores this clear legislative guidance.

Meta likewise ignores other record sources of public policy guidance—including the FTC's August 5, 2021, letter to Mark Zuckerberg that both highlighted that agency's recognition of the importance of "efforts to shed light on opaque business practices, especially around surveillance-based advertising" and admonished Meta for apparently "invoking privacy - much less the FTC consent order – as a pretext to advance other aims." Dkt. 268-20; *see also* Ex. DD (March 14, 2022 letter from FTC chair stating "I agree that it is improper for firms under order to use FTC consent decrees as cover for business decisions that may constitute unfair methods of competition or that may unjustifiably deny the public access to information."). Meta ignores repeated, bipartisan Congressional statements reiterating the public interest in competition and transparency in the advertising analytics market. Dkt. 268-22; Dkt. 268-33. And, perhaps most egregious of all, Meta ignores both (1) the Ninth Circuit's prior finding that giving social media companies "free rein to decide, on any basis, who can collect and use data—data that the companies do not own, that they otherwise make publicly available to viewers, and that the companies themselves collect and use—risks the possible creation of information monopolies that would disserve the public interest," *hiQ Labs, Inc. v. LinkedIn Corp.*, 938 F.3d 985, 1005 (9th Cir. 2019), and (2) this Court's application of that finding to conclude that "[a]llowing a third party like BrandTotal to compete with Facebook to provide data analytics services about advertising campaigns on Facebook's networks—advertising for which Facebook is already compensated by the advertisers—would be consistent with a strong public interest in 'maximizing the free flow of information on the Internet' and fostering competition and innovation." Dkt. 63 at 33 (quoting *hiQ*, 938 F.3d at 1004). Rather than meaningfully engaging with these policy findings, Meta

pretends they do not exist. They do and, for all the reasons set forth in BrandTotal's summary judgment brief, heavily outweigh the generalized public interest in contract enforcement—which is weak here since the ToS is an unconscionable adhesion contract. *See* Dkt. 268 at 30-32.

Meta's next argument in favor of its automated collection ban is an inapposite "everybody does it" defense. Dkt. 272 at 14 ("Moreover, Meta's prohibition on unauthorized automated data collection is commonplace…"). Putting aside other infirmities with that argument, it fails at the outset because BrandTotal's policy arguments are tailored to Meta's unique position as the world's largest—by far—social media network and the way it enforces the provision. As Senator Cantwell explained in a letter requesting an FTC investigation into Meta's advertising metrics, "Facebook reportedly controlled approximately 74 percent of the social media market in July 2020 and now reportedly controls 24.1 percent of all of U.S. digital advertising spending." Dkt. 268-33 at 1. Because of this dominant position, Meta reaped a whopping $115 *billion* in advertising revenue in 2021 alone. Dkt. 268 at 18. As BrandTotal explained in its summary judgment brief, the public has a deep interest in policing Meta's own demonstrably flawed assertions about the effectiveness of advertisements that advertisers are spending such massive sums to purchase. *See* Dkt. 268 at 12-13, 18-22; *see also* Ex. NN; Ex. OO. Indeed, internal emails among Meta executives—emails that Meta withheld from production in this litigation—confirm both Meta's awareness of the flaws in its in-house advertising analytics and the intense public interest in the issue. Ex. JJ; Ex. KK; Ex. LL. And the public has an equally deep interest in promoting the flow of advertising and other information in what the Supreme Court has recognized is the "modern public square." *Packingham v. North Carolina*, 137 S. Ct. 1730, 1732 (2017); Dkt. 68 at 22-30. Meta has made no showing that other platforms and entities that it alleges include similar automated collection bans in their terms of service present anything approaching these public policy concerns.[9] Accordingly, its scaremongering about the potential far-reaching impact of an unenforceability finding on public policy grounds here is baseless.[10]

[9] Ironically, the most analogous entity Meta cites is LinkedIn (Dkt. 272 at 14, n.6), the same company whose platform the Ninth Circuit in *hiQ* found the public had an interest in accessing.

[10] The same is true of the vague, inchoate concerns expressed by Dr. Thaw, which Meta does not rely upon, but references indirectly in a footnote. Dkt. 272 at 14, n.6. As explained in

The prior decisions involving Meta that it cites (*see* Dkt. 272 at 15) are all eminently distinguishable. *Facebook, Inc. v. Power Ventures, Inc.*, 252 F. Supp. 3d 765 (N.D. Cal. 2017) did not involve Meta's ToS or any breach of contract allegations and did not involve the circumstances presented by UpVoice (2021)—user-authorized data collection from a user's browser, not from Facebook. *Facebook, Inc.* v. *Sluchevsky*, Case No. 19-cv-01277-JSC, 2020 WL 5823277 (N. D. Cal. Aug. 28, 2020) did involve breach of contract claims but is otherwise even less on point—it was a default judgment case in which the Court simply repeated as true Meta's unrebutted allegations, none of which involved user-authorized data collection. *Sluchevsky*, 2020 WL 5823277, at *1. As for *Stackla, Inc. v. Facebook Inc.*, the Court's public interest analysis focused on policy concerns expressed by Congress and the FTC which, as explained above, counsel in favor of an unenforceability finding, rather than against. No. 19-CV-05849-PJH, 2019 WL 4738288, at *6 (N.D. Cal. Sept. 27, 2019).

As to Meta's invocation of the parties' conduct (Dkt. 272 at 15), to the extent it has any relevance to the public policy analysis, it only undercuts Meta's position. Aside from being rife with mischaracterizations and even outright falsehoods, the isolated BrandTotal data collection errors Meta highlights underscore BrandTotal's good faith efforts to correct and improve its service. BrandTotal would have been more than happy to address these issues cooperatively with Meta and did provide Meta with pre-launch code for UpVoice (2021). Meta's response—intensified efforts to drive BrandTotal out of business via litigation—only confirms that it has no intent of ever approving automated collection from its platform.

2. Meta Has Not Carried Its Burden to Prove Any Damages Attributable to BrandTotal's Alleged Breach

Even if Meta's ToS were enforceable, its request for summary judgment should still be denied because it has failed to establish an essential element of its cause of action—harm attributable to BrandTotal's alleged breach. Under California law, it is well-settled that the

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BrandTotal's motion to exclude, Dr. Thaw's proposed testimony is completely speculative and unmoored from the facts of this case and should be excluded. Dkt. 248 at 17-22. Given that Meta did not cite Dr. Thaw's analysis directly, it appears to agree that his analysis is of limited probative value on the public interest question.

plaintiff in a breach of contract action is entitled only to damages sufficient to return the parties to the situation they would have been in if both performed under the contract, ***and nothing more***:

> The measure of damages for defendants' breach of contract is the amount which will compensate plaintiff for all ***the detriment proximately caused thereby***, or which, in the ordinary course of things, would be likely to result therefrom. ***Plaintiff is entitled to all the benefits which it would have obtained if the contract had been performed by both parties but not to more than it would have received by such performance***. Plaintiff cannot recover for loss which by reasonable means it could have avoided…often called the duty to mitigate damages.

Steelduct Co. v. Henger-Seltzer Co., 26 Cal. 2d 634, 648–49 (1945) (citations and quotation marks omitted); *see also* Cal. Civ. Code § 3300. Further, "to establish contractual damages, a plaintiff must establish 'appreciable and actual damage.'" *Luxul Tech. Inc. v. NectarLux*, LLC, No. 14-CV-03656-LHK, 2016 WL 3345464, at *11 (N.D. Cal. June 16, 2016) (citing *Aguilera v. Pirelli Armstrong Tire Corp.*, 223 F.3d 1010, 1015 (9th Cir. 2000)). "Nominal damages, speculative harm, or threat of future harm do not suffice to show legally cognizable injury." *Luxul*, 2016 WL 3345464, at *11. Meta has failed to proffer evidence that meeting these standards.

a. None of Meta's Alleged Compensatory Damages Were Caused by BrandTotal's Alleged Breach

Meta's compensatory damages claim is limited to [redacted] that, according to Meta's damages expert, "represents the value or cost of the investigation [of BrandTotal] to Meta." Dkt. 272-5, Ex. A to Prowse Decl., ¶ 3. Meta does not seek money to compensate it for harm to its servers or other computer systems—because Meta has failed to identify any such damage.[11] It does not include money to compensate Meta for lost advertisers, revenue, or any other form of actual loss resulting from BrandTotal's alleged breach—because no such losses occurred. The only theory of harm that Meta's extensive team of lawyers could come up with was the "harm" caused by Meta's conscious choice to build its case against and sue BrandTotal.

[11] Meta's damages expert made vague references to other alleged "[redacted]" (Dkt. 272-5 at ¶ 38), but neither he nor Meta's corporate witness identified [redacted] Ex. B, pp. 35–36, 43–44. Unrebutted analysis by BrandTotal's technical expert, moreover, shows that the aggregate network "burden" of BrandTotal's collection is the equivalent of a single additional user. Ex. 20, § 5.3. This undetectably small impact cannot meet the "actual and ascertainable" requirement that the law imposes—which is presumably why Meta does not even attempt to rely on it.

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This circular theory fails as a matter of law. Meta's alleged damages were not proximately caused by BrandTotal's alleged breach. Instead, they were caused Meta's conscious decision to persecute a company that—as the record now indisputably shows—was not in fact causing Meta any harm. Review of the specific line items of "costs" for which Meta seeks compensation underscores this point. Of the [redacted] that Meta seeks, by its own admission only [redacted] stem from activities that occurred before Meta filed this lawsuit. Every dollar out of this [redacted] in purported pre-suit "damages" is completely attributable to work performed by full-time, salaried Meta employees in the ordinary course of their duties. Dkt. 272-5, ¶ 35. These salaried employees are [redacted] *Id.*, ¶¶ 23-35. It is undisputed that BrandTotal has nothing to do with Meta's decision to [redacted]. In other words, ***the [redacted] Meta seeks in pre-suit "damages" is money that Meta [redacted] and money that would have been paid regardless of whether BrandTotal ever existed***. BrandTotal's alleged breach plainly did not proximately cause these costs and they cannot satisfy the damages element of a breach of contract claim. *See St. Paul Fire & Marine Ins. Co. v. Am. Dynasty Surplus Lines Ins. Co.*, 101 Cal. App. 4th 1038, 1060, (2002) ("An essential element of a claim for breach of contract are damages *resulting from the breach*. Causation of damages in contract cases requires that the damages be proximately caused by the defendant's breach." (emphasis in original, citation omitted)).

The approximately [redacted] in post-litigation alleged damages that Meta seeks are even less justifiable. A portion of this [redacted] is made up of permanent employee salaries and fails for the reasons discussed above. Dkt. 272-5, ¶ 35. The balance comprises [redacted]. In other words, these are simply litigation expenses that parties bear in the ordinary course of litigation, and in any event are costs that Meta, not BrandTotal, caused by choosing to initiate this litigation and engaging in scorched earth tactics throughout. Further, Meta has claimed that communications relating to these investigative activities are privileged and refused to produce

them. Dkt. 205. Indeed, it has claimed that its legal team [redacted] (*id.* at 3), even further undermining its claim for damages. This confirms that these "damages" are simply litigation costs no different in principle from attorneys' fees, and thus cannot satisfy the harm element of an ordinary breach of contract action.[12] *Accord Dao v. Liberty Life Assurance Co. of Bos.*, No. 14-CV-04749-SI, 2015 WL 5882056, at *2 (N.D. Cal. Oct. 8, 2015) ("The Court concludes that plaintiff cannot seek attorneys' fees as consequential damages [in a breach of contract action]."). [13] Indeed, since every breach of contract claim requires some type of pre-suit investigation (at least in order to comply with Rule 11), a holding that the pre- and post-litigation investigative costs Meta relies upon here are cognizable damages would reduce the damages element of the breach of contract cause of action to mere surplusage—a result that is contrary to California law. *Aguilera*, 223 F.3d at 1015 ("Under California law, a breach of contract claim requires a showing of appreciable and actual damage."). If the damages requirement is to have any force as an independent element of a breach of contract claim, the compensatory damages that Meta seeks cannot be sufficient. At the very least, a reasonable dispute exists over whether these costs arise from BrandTotal's alleged breach or Meta's litigation decisions and summary judgment in Meta's favor is inappropriate.

The single district court case that Meta cites for the proposition that "'security and investigation costs' constitute breach of contract damages" is not on point. Dkt. 272 at 12 (citing *E. & J. Gallo Winery v. Instituut Voor Landbouw-En Visserijonderzoek*, No. 1:17-cv-00808-DAD-EPG, 2018 WL 2463869, at *9 (E.D. Cal. June 1, 2018)). *Gallo* was decided at the pleadings stage, included minimal analysis, and stands for nothing more than that a plaintiff's allegations that "as a result of the breach, [it has] incurred 'security and investigation costs'…are sufficient to state a breach of contract claim." *Gallo*, 2018 WL 2463869, at *9. Further, *Gallo* makes clear that any cognizable "security and investigation costs" must still be caused by the alleged breach. As explained above, the investigation costs Meta relies upon fail this causation

[12] The exception to this general rule, inapplicable here, is breach of certain insurance agreements in which compensation for investigation and attorney fees is a material part of the underlying contract.

[13] This issue also defeats Meta's claim for summary judgment as to its CFAA claim. *See* § II.A.

requirement.

Far more instructive is *Ruiz v. Gap, Inc.*, 622 F. Supp. 2d 908 (N.D. Cal. 2009), *aff'd,* 380 F. App'x 689 (9th Cir. 2010)—a case on which Meta has repeatedly relied in other litigations when defending against claims by its customers that Meta has breached its own ToS. *See e.g.*, *In Re Facebook Privacy Litigation*, No. 12-15619, 2012 WL 4764112, at *18 (9th Cir. Sept. 26, 2012); Ex. MM at 10. In *Ruiz*, the theft of certain laptops, which allegedly occurred because of a breach of contract relating to data security and confidentiality, resulted in disclosure of the plaintiff's personal information. *Ruiz*, 622 F. Supp. 2d at 910–11. The plaintiff in *Ruiz* alleged that this disclosure had caused harm, and cited the cost of credit monitoring services purchased as a result of the alleged breach of contract as a compensable effort to mitigate damages. *Id.* at 918. The *Ruiz* court rejected that argument, finding that "Ruiz has no actual damages to mitigate since he has never been a victim of identity theft," and holding that because "Ruiz has presented no evidence of legally cognizable damage under California contract law…[defendant] is entitled to summary judgment…" *Id.*

The same logic applies here. The most favorable (from Meta's point of view) interpretation of Meta's investigative costs is that they—much like the credit monitoring service in *Ruiz*—were an effort to determine if BrandTotal's alleged breach had caused Meta harm. Under *Ruiz*, costs associated with such efforts to determine if harm occurred, without more, are insufficient to support a breach of contract claim.

b. Meta's Manifestly Unfair Unjust Enrichment Claim Cannot Preserve Its Deficient Damages Claim

Perhaps recognizing the frailty of its compensatory damages claim, Meta proffers a second basis for its assertion that the fact of damages has been established—the existence of its unjust enrichment claim. This argument fares no better. As an initial matter, under a long line of California authority, unjust enrichment is *per se* unavailable as a breach of contract remedy, unless the Plaintiff itself avers that the contract is unenforceable:

> Additionally, Plaintiff's alternative allegation that she and the Class are entitled to restitution as a result of Defendants' breach of contract is simply incorrect as a matter of law. Generally, if two parties have a valid and enforceable written contract,

> the plaintiff may not proceed on a claim in quasi-contract, *i.e.*, a claim of restitution or unjust enrichment. ***A plaintiff may not plead the existence of an enforceable contract and maintain a quasi-contract claim at the same time***, unless the plaintiff has pled facts suggesting that the contract may be unenforceable or invalid.

Svenson v. Google Inc., 65 F. Supp. 3d 717, 723–24 (N.D. Cal. 2014) (citation, brackets, and quotations omitted); *see also Saroya v. Univ. of the Pac.*, 503 F. Supp. 3d 986, 998 (N.D. Cal. 2020) (same); *In re Facebook Priv. Litig.*, 791 F. Supp. 2d 705, 718 (N.D. Cal. 2011), *aff'd*, 572 F. App'x 494 (9th Cir. 2014) ("***Under California law, unjust enrichment is an action in quasi-contract***…[a]lthough Rule 8 of the Federal Rules of Civil Procedure allows a party to state multiple, even inconsistent claims, ***the rule does not allow a plaintiff invoking state law to assert an unjust enrichment claim while also alleging an express contract***."); *Klein v. Chevron U.S.A., Inc.*, 202 Cal. App. 4th 1342, 1389–90, 137 Cal. Rptr. 3d 293, 332 (2012) ("[P]laintiffs' breach of contract claim pleaded the existence of an enforceable agreement and their unjust enrichment claim did not deny the existence or enforceability of that agreement. Plaintiffs are therefore precluded from asserting a quasi-contract claim under the theory of unjust enrichment."). Here, far from admitting unenforceability, Meta has done just the opposite and opposed BrandTotal's unenforceability arguments.[14] The Court should follow the great weight of authority and find that Meta's unjust enrichment claim is precluded as a matter of law.

Meta's invocation of *Foster Poultry Farms, Inc. v. SunTrust Bank*, 377 F. App'x 665, 669 (9th Cir. 2010) does not necessitate a different result. That unpublished decision is non-precedential, and did not even examine the long line of cases—including Ninth Circuit cases—holding that unjust enrichment claims cannot coexist with claims that an allegedly enforceable contract has been breached. *See, e.g.*, *Paracor Fin., Inc. v. Gen. Elec. Cap. Corp.*, 96 F.3d 1151, 1167 (9th Cir. 1996) ("Under both California and New York law, unjust enrichment is an action in quasi-contract, which does not lie when an enforceable, binding agreement exists defining the rights of the parties."); *Attebury Grain LLC v. Grayn Co.*, 721 F. App'x 669, 672 (9th Cir. 2018) (reversing summary judgment and ordering dismissal of plaintiff's "legally deficient unjust

[14] To be clear, the Court should find that Meta is wrong and BrandTotal is correct, and that Meta's ToS are unenforceable as to BrandTotal. As the authorities cited above establish, however, it is Plaintiff's insistence that its contract is enforceable—not the ultimate legal outcome of the unenforceability analysis—that dooms its unjust enrichment claim.

enrichment claim" because "Attebury's relationship with Superior was defined by contract, so Attebury cannot advance a quasi-contract action premised on Superior's breach of that contract"). Further, *Foster Poultry* by its own terms is limited to instances where a party entrusted with trade secrets or other confidential or proprietary information breaches a related confidentiality agreement, and profits from information that it effectively held in trust for the plaintiff. 377 F. App'x at 668. Nothing like those facts is present here; instead Meta's breach of contract allegations focus on a particular method (automated collection) that BrandTotal uses to obtain information that does not belong to Meta.

Even if unjust enrichment damages can under some circumstances be cognizable for breach of contract purposes, the Court should use its discretion to categorically reject any award of unjust enrichment here. Unjust enrichment is an equitable remedy, and those that seek equitable relief "must come into court with clean hands, and keep them clean, or [they] will be denied relief, regardless of the merits of his claim." *Kendall-Jackson Winery, Ltd. v. Superior Ct.*, 76 Cal. App. 4th 970, 978, (1999), *as modified on denial of reh'g* (Jan. 3, 2000). Meta's hands are anything but clean.

To the contrary, Meta demeans and smears BrandTotal for "data scraping," yet its business model relies upon scraping and monetizing user data, including user data from activity *off of Meta products*. Dkt. 268 at 11-12. Whereas BrandTotal is transparent with its panelists about its data collection and compensates them for the use of their data, Meta lures users into its platforms through promises of free access to a global community, while obscuring the latent price of that access—constant surveillance and data scraping by Meta, on and off Meta products. *Id.* at 10-12. And while Meta makes much of purely hypothetical concerns about BrandTotal's data collection—even though there is no evidence that BrandTotal has misused any information with which its Panelists have entrusted it or that any third-party has improperly obtained any of this information—Meta itself has a documented record of exposing user's sensitive information. *See, e.g.*, Ex. II.

Meta's conduct towards BrandTotal has also been deeply inequitable. Meta knew of BrandTotal since at least May 2018 and had investigated BrandTotal and its business model, yet

it delayed in bringing this lawsuit until late 2020. In the almost two years that elapsed between Meta's initial investigation (which identified no harm to Meta and even prompted one Meta employee to recommend a partnership with BrandTotal) and its initiation of this litigation, BrandTotal invested millions of dollars into its business—including [redacted] dollars spent on Facebook.com advertisements—and built a thriving advertising analytics company. Meta happily accepted BrandTotal's advertising money and never said a word to BrandTotal about any concerns it had with BrandTotal's business model—until it sued them without warning. Ex. 40 at FB_BRTL_00028694. In other words, despite having actual knowledge of BrandTotal's activities, Meta remained silent, signaled acquiescence to BrandTotal's activities by accepting BrandTotal's advertising payments, and prejudicially lay in wait while BrandTotal built a business around conduct that Meta now alleges amount to a breach of contract. These undisputed facts are more than sufficient to establish the equitable defenses of unclean hands and laches. *Accord Kendall-Jackson Winery*, 76 Cal. App. at 979 ("Any conduct that violates conscience, or good faith, or other equitable standards of conduct is sufficient cause to invoke the doctrine [of unclean hands]."); *Morgan Hill Concerned Parents Ass'n v. California Dep't of Educ.*, 258 F. Supp. 3d 1114, 1132 (E.D. Cal. 2017) ("To successfully establish laches, a party must show (1) there was inexcusable delay in the assertion of a known right and (2) the party asserting laches has been prejudiced."). The Court has discretion to use these doctrines to bar Meta's entire claim and should at a minimum hold that they preclude Meta from receiving the equitable remedy of unjust enrichment.

3. BrandTotal's Contract Termination Defense is Meritorious and at a Minimum Involves Disputed Factual Issues That Preclude Summary Judgment

It is undisputed that Meta cancelled BrandTotal's Facebook and Instagram accounts at the outset of this litigation and has not reactivated any of them. Accordingly, to the extent there ever was an enforceable agreement between BrandTotal and Meta, it terminated on the date of cancellation. *See* Dkt. 272-5, §4.2. Meta's reliance on the "survival clause" of ToS § 4.2, which states that "the following provisions will remain in place [post-termination]: 3, 4.2-4.5," is

misplaced. This language does not point out section 3.2.3 specifically and instead broadly states that an entire section of the agreement "will remain in place." The relevant section, 3, is titled "Your commitments to Facebook and our community," addresses a wide variety of issues—most of which are only relevant if one has an active Facebook account—and begins with the statement that "[w]e ***provide these services to you*** and others to help advance our mission. ***In exchange***, we need you to make the following commitments." Dkt. 272-5, § 3. In other words, by its own terms, ***Section 3's "commitments" are conditional on Meta's agreement to "provide these services.***"

Under California law, "[w]hen a court interprets a contract to determine the parties' intent, the whole of the contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other." *Congdon v. Uber Techs., Inc.*, 291 F. Supp. 3d 1012, 1021 (N.D. Cal. 2018) (brackets and quotation marks omitted). With these principles in mind, the Court should not interpret the ToS to create life-long prohibitions on automated collection for every Facebook user—something that no Facebook user could reasonably have intended or expected, and that is inconsistent with the preamble of Section 3. At a minimum, the tension between Section 4.2 and Section 3 creates ambiguity, and it is well-settled in California that "ambiguities in written agreements are to be construed against their drafters." *Castillo v. CleanNet USA, Inc.*, 358 F. Supp. 3d 912, 946 (N.D. Cal. 2018). That canon "applies with particular force where the contract is one of adhesion, that is, one where one party has disproportionate bargaining power relative to the other." *Id.* If the Court were inclined to interpret the ToS to create lifelong automated collection prohibitions for former users, it should find that provision both procedurally and substantively unconscionable, for all the reasons set forth in BrandTotal's summary judgment brief. Dkt. 263 at 30-32

Finally, Meta's contention that BrandTotal is still bound by the ToS because of still-active accounts is not supported by the facts of record. BrandTotal disputes—and none of the evidence Meta cites establishes—that any of those accounts belong to BrandTotal. Indeed, BrandTotal could not possibly have created one of the accounts since—by Meta's own admission—it was created in 2007, almost a decade before BrandTotal existed. Karve Decl. ¶ 13. Plainly, disputed facts preclude summary determination of this issue.

4. Other Factual Issues Preclude Summary Judgment

As explained in BrandTotal's affirmative brief, UpVoice (2021) collects information from a user's browser—not from Facebook. Dkt. 268 at 6-7. Meta's summary judgment motion as to UpVoice (2021) should be denied for that independent reason. Meta's broad, thinly supported assertions regarding "other contract terms" besides Section 3.2.3 are also hotly disputed. Dkt. 272 at 11. For example, BrandTotal denies that products like UpVoice (2021) accessed data it did not have permission to access—all data was user authorized and/or public—and that the accounts BrandTotal cites as having been created after termination belonged to BrandTotal. Further, Meta has identified no damages specifically attributable to these alleged breaches.

B. Judgment is Not Warranted on Meta's CFAA Claims.

1. Meta Has Not Shown that BrandTotal Caused a Loss of $5,000 or More

To maintain a civil CFAA claim, Meta must establish loss "aggregating at least $5,000 in value." 18 U.S.C. § 1030(c)(4)(A)(i)(1). Meta (unsurprisingly) does not claim any harm to its servers. "At least one court has noted '[t]he definition of 'loss' itself makes clear Congress's intent to restrict civil actions under subsection (I) to the traditional computer 'hacker' scenario—where the hacker deletes information, infects computers, or crashes networks.'" *Welenco, Inc. v. Corbell*, 126 F. Supp. 3d 1154, 1169 (E.D. Cal. 2015) (citing *AtPac, Inc. v. Aptitude Solutions, Inc.*, 730 F. Supp. 2d 1174, 1185 (E.D. Cal. 2010); *In re iPhone Application Litig.*, 844 F. Supp. 2d 1040, 1067 (N.D. Cal. 2012) (citing *AtPac*, 730 F. Supp. 2d at 1185)). Meta cannot show any such "loss."

Meta instead claims only costs spent in "investigating" BrandTotal. Dkt. 272 at 18 ("[I]n the one-year period after October 1, 2020, Meta incurred $95,784 in losses identifying, analyzing, and responding to BrandTotal's conduct."). Yet these costs also cannot be considered "loss" under the CFAA "because the CFAA gives victims a civil remedy, it is likely that at some point, a victim's actions will shift away from responding directly to an offense and toward building a civil case against the offender. Costs incurred for the purpose of building or supporting the victim's civil case should not be considered 'loss' for purposes of the Guidelines calculation." *United States v. Nosal*, No. CR-08-0237 EMC, 2014 WL 121519, at *6 (N.D. Cal. Jan. 13, 2014). The

only costs identified in Meta's summary judgment motion are costs it purportedly incurred after October 1, 2020, when it sued BrandTotal. Dkt. 272 at 18. Moreover, by Meta's own admission, [redacted] Dkt. 205 at 3. Meta has not shown that it has met the jurisdictional loss amount. At the very least, a reasonable dispute exists over whether the costs Meta claims to have incurred are properly considered "losses." Meta is therefore not entitled to summary judgment on its CFAA claims as to any of BrandTotal's applications, extensions, or server-side collection software and the Court need not reach BrandTotal's other defenses regarding whether Meta's claims are untimely and whether BrandTotal's software circumvents any technical barriers.

2. BrandTotal's Current Collection Software Does Not Violate the CFAA

Meta's improperly attempts to expand[15] the Computer Fraud and Abuse Act ("CFAA") from an anti-hacking statute to cover BrandTotal's behavior. "The statutory purpose of the CFAA is to punish trespassers and hackers." *Bittman v. Fox*, 107 F. Supp. 3d 896, 900–01 (N.D. Ill. 2015) (citing *Kluber Skahan & Associates, Inc. v. Cordogen*, *Clark & Assoc., Inc.*, No. 08–CV–1529, 2009 WL 466812, at *8 (N.D. Ill. Feb. 25, 2009); *Int'l Airport Centers, L.L.C. v. Citrin*, 440 F.3d 418, 420 (7th Cir. 2006) ("Congress was concerned with . . . attacks by virus and worm writers, on the one hand, which come mainly from the outside, and attacks by disgruntled programmers who decide to trash the employer's data system on the way out . . . .").

a. BrandTotal's Extensions Do Not Access Meta's Computers

There is no dispute that UpVoice (2021) and the extensions that share the same collection code as UpVoice (2021)[16] do not directly communicate with Meta's computers. Despite conducting copious amount of "network tracing," Meta's expert Mr. Martens opined only that UpVoice (2021) engaged in "reactive collection," Ex. 1 at ¶ 481. Although Meta now argues

[15] *Oracle Corp. v. SAP AG*, 734 F. Supp. 2d 956, 967 (N.D. Cal. 2010) ("Because the CFAA has both criminal and noncriminal applications, the court finds that the statute should be construed narrowly, as opposed to broadly.").

[16] These extensions include Calix and the Restricted Panel extensions plus the modified Social One and Phoenix applications.

UpVoice (2021) "intercepts" data from Meta's computers, Dkt. 272 at 20, and "inject[s] itself in communications between third-parties and Meta's computers," *id.*, its claims are contradicted by the opinions of its own expert. Mr. Martens confirmed that UpVoice (2021) simply "monitors" the "content UpVoice users see and interact with through Facebook . . . ." Ex. 1 at ¶ 472; *see also* Ex. F, 97:6–18 ("I'm not aware of an instance where UpVoice 2021 initiates communication on its own initiative to Facebook or Instagram servers and receives information back, you know, akin to what I've called active collection."). And when describing the operation of UpVoice (2021), Mr. Martens confirmed that UpVoice (2021) does not "intercept" anything. Ex. 1 at ¶¶ 484–485. Rather, the browser first "retreiv[es] all incorporated-by-reference components for the main HTML document," which then issues an event notifying installed extensions that a HTML document has been loaded. *Id*. at ¶ 484. UpVoice (2021) then "responds" to this event. *Id*. at ¶ 485. UpVoice (2021) "accesses" only the computer of the Panelist, who has given BrandTotal permission to do so.

BrandTotal's current extensions thus do not access Meta-controlled servers and do not violate the CFAA either "on the facts" or "on the law." Dkt. 272 at 20. To argue otherwise, Meta drastically expands the meaning of "access" to cover the operation of BrandTotal's extensions. *Id*. But the Ninth Circuit has already made clear that a violation of the CFAA requires access, not merely misuse or misappropriation. *United States v. Nosal*, 676 F.3d 854, 863 (9th Cir. 2012) ("[T]he plain language of the CFAA 'target[s] the unauthorized procurement or alteration of information, not its misuse or misappropriation.'") (quoting *Shamrock Foods Co. v. Gast*, 535 F. Supp. 2d 962, 965 (D. Ariz. 2008)). Interpreting *Nosal*, this Court has also rejected a similar argument that an entity was merely "a conduit by which the CFAA Defendants engaged in their own unauthorized access." *Koninklijke Philips N.V. v. Elec-Tech Int'l Co*., No. 14-CV-02737-BLF, 2015 WL 1289984, at *4 (N.D. Cal. Mar. 20, 2015).

Meta cannot transform this case into *Power Ventures* were the facts are nothing alike. Dkt. 272 at 16, 18, 20, 22 (citing *Facebook, Inc. v. Power Ventures*, 844 F.3d 1058 (9th Cir. 2016)). There, the defendant continued to not only "interact with," but make use of Facebook resources to "[c]ause a message to be transmitted to the user's friends within the Facebook system" and

generate an e-mail message that "stated that the message came from Facebook" and was "signed, 'The Facebook Team.'" *Id.* at 1063. Here, BrandTotal's extensions do not interact with Meta's computers and instead "monitors" and "reacts to" information on the Panelists' computer as those Panelists browse Facebook. Meta has not withdrawn authorization for Panelists to access Facebook. This case is thus governed by the reasoning of *Koninklijke* and Meta cannot show BrandTotal violated the CFAA by obtaining information from Panelists, who were authorized to access Facebook, through its UpVoice (2021) and related extensions when those extensions themselves did not access Meta's computers. Meta "offers no legal authority for the proposition that an entity or individual can violate the CFAA by obtaining information from a person who has authorization to access a protected computer." *Experian Mktg. Sols., Inc. v. Lehman*, No. 1:15-CV-476, 2015 WL 5714541, at *8 (W.D. Mich. Sept. 29, 2015)

b. BrandTotal's Server-Side Collection Does Not Violate the CFAA

Meta also has not shown BrandTotal's backend or server-side collection software violates the CFAA by accessing advertisement-URLs that do not require a username.[17] Meta argues that the URLs do not require a password is "legally irrelevant" because the Ninth Circuit's *hiQ* decision was vacated. Dkt. 272 at 21 (citing *hiQ Labs*, 938 F.3d 985; 141 S. Ct. 2752). Meta is wrong.

Although the Supreme Court vacated the *hiQ* decision, *Van Buren* ***narrowed*** the scope of the CFAA by holding that a police officer did not "exceed authorization" by obtaining information for an improper purpose. *Van Buren v. United States*, 141 S. Ct. 1648, 1662 (2021). Thus, far from being "irreconcilable" with *Van Buren*, Dkt. 272 at 21, both *Van Buren* and *hiQ* interpret the CFAA consistent with its stated purpose to address hackers. Moreover, *Van Buren* instructed courts to use a technical understanding of terms in the CFAA, 141 S. Ct. at 1658 n.7, and there is at least a reasonable dispute regarding whether the use of IP-blocking in a public site

[17] As noted above, the Court need not reach Meta's claims that BrandTotal's server-side collection accessed advertisement-URLs that were not public because Meta has not shown that it meets the jurisdictional requirement to maintain the CFAA claim. Regardless, a genuine dispute exists because a reasonable juror could find that placing a password over content that is otherwise public does not transform the content from public to private.

meets the technical meaning of "without authorization." The Ninth Circuit has since also heard argument in the *hiQ* case on remand and was critical of LinkedIn's arguments, many of which Meta repeats here.[18] At the very least, this issue presents a material dispute and summary judgment is inappropriate. Regardless, the Ninth Circuit's reasoning in *hiQ* still supports BrandTotal. It was not the first decision to distinguish between public websites and non-public sites that are password-protected. *See Konop v. Hawaiian Airlines, Inc.*, 302 F.3d 868, 875 (9th Cir. 2002). BrandTotal's backend accesses advertisement-URLs that are not password protected and under prior precedent is collectable public data, no different than collecting billboard data driving down the highway.

C. Meta Is Not Entitled to Summary Judgment on Its CDAFA and UCL Claims

Meta argues that it is also entitled to summary judgment on its CDAFA (Cal. Penal Code § 502) claim "[g]iven the statutes' close similarity." Dkt. 272 at 22. Because Meta has failed to show it is entitled to summary judgment on its CFAA, however, it has also failed to show it is entitled to summary judgment on its CDAFA claim. Similarly, because Meta argues it is entitled to summary judgment on its claim under the unlawful prong of the UCL solely because it argues BrandTotal violated the CFAA and CDAFA, *id.*, its failure to show it is entitled to summary judgment on these claims precludes judgment on the UCL claim.

D. Judgment for Meta is Not Warranted on BrandTotal's Interference Claims

On June 3, 2021, this Court examining much of the same evidence now before the Court, found that BrandTotal stated a cause of action for interference with contracts and violation of California's Unfair Competition Law. Dkt. 158. While that analysis was in the context of a motion to dismiss where statements in the pleadings are accepted as true, BrandTotal's pleading cited and relied on documentary and deposition evidence. For example, as alleged and supported by record evidence, Meta investigated BrandTotal in 2018, and again in the Spring of 2020, yet it did not take any action against BrandTotal until the Fall of 2020; the same point at which emails reflect Meta advertisers asking it about BrandTotal. *Supra* § 2.C. Then, without any investigation of BrandTotal's panelist consent program, it falsely told Google that it believed that BrandTotal was

[18] *See* https://www.ca9.uscourts.gov/media/video/?20211018/17-16783/.

"improperly scraping user PII (e.g., gender, relationship status, ad interests, etc.), without proper disclosure." Dkt. 272, Ex. 34 at FB_BRTL_00016961As found at the motion to dismiss stage, the wording to Google combined with the timing and other evidence alleged "raises at least a specter of bad faith sufficient to render BrandTotal's allegations plausible." Dkt. 158 at 15. Nothing uncovered in discovery since that time alters this plausible inference from which a juror could find interference.[19]

1. BrandTotal's Contracts are Not Unlawful

Latching onto this Court's statement in the motion to dismiss order preserving the *prospective* economic interference counterclaims to the extent any contract was unenforceable, Dkt. 158 at 23-24, Meta contends that BrandTotal's intentional interference counterclaims fail because, according to Meta, all BrandTotal's contracts are "unlawful." Dkt. 272 at 23. Meta's theory is that because BrandTotal's business is built upon automated data collection and Meta forbids automated collection, BrandTotal's contracts are necessarily unlawful. *Id*. This argument is wrong on the law and the facts.

As an initial matter, Meta never analyzes or even cites the language of the BrandTotal contracts that it repeatedly asserts are unlawful and unenforceable. It never explains how performance of the contracts is "predicated on the breach of Meta's terms." Dkt. 272 at 23. Instead, it simply asserts illegality as a matter of fact and asks the Court to grant it summary judgment based on its pure *ipse dixit*. That is inappropriate under normal circumstances, and is particularly so here given that "the party who asserts the illegality of a contract bears the burden of proof on that point." *Rock River Commc'ns, Inc. v. Universal Music Grp., Inc.*, 745 F.3d 343, 350 (9th Cir. 2014).

[19] Notably absent from Meta's summary judgment motion is any argument that it was justified in moving against BrandTotal due to the FTC Consent Order. *Compare* Dkt. 158 at 10-14 (discussing Meta's justification defense involving the FTC Order). After the motion to dismiss proceedings, the FTC cautioned Meta against "invoking privacy –much less the FTC consent order – as a pretext to advance other aims," and emphasized that "efforts to shield targeted advertising practices from scrutiny run counter to [the FTC's] mission." Dkt. 268-20. Meta noticeably has not reasserted its primary argument at the motion to dismiss stage despite the Court calling it Meta's "clearest basis" for potentially dismissing BrandTotal's tortious interference counterclaims. Dkt. 158 at 10.

Meta could not make such a showing in any event because BrandTotal's contracts do not require any illegal activity. Its contracts with customer-companies require BrandTotal to provide social media analytics and insights; they do not specify any method for collecting the information used to generate the analytics and insights. Ex. P. As to its contracts with user-panelists, they require BrandTotal to provide gift cards in exchange for access to information that, under California law, belongs to panelists. Dkt. 268 at 16. Again, this is not unlawful. Further, Meta's argument that performance on BrandTotal's contracts requires breach of an enforceable contract fails in any event because Meta's Terms of Service are unenforceable and BrandTotal has not breached them, for all the reasons set forth above and in BrandTotal's affirmative summary judgment brief.

None of Meta's cited authority is to the contrary. The Restatement language Meta quotes is out of context; § 576 is titled "Bargain ***Requiring*** Breach of a Contract With a Third Person," and the cited comment reiterates that the section pertains only to contracts that "***require***[] for [their] performance breach of a contract with another." As discussed above, Meta has made no showing that any of the contracts in question ***require*** breach to be performed. Restatement of Contracts § 576 & cmt. A. Meta's reliance on *Bed, Bath & Beyond of La Jolla, Inc. v. La Jolla Village Square Venture Partners*, 52 Cal. App. 4th 867, 879 (1997) is unavailing because Meta has not shown that any BrandTotal contract is unenforceable. And its citation to *Williams v. Eaze Solutions, Inc.*, 417 F. Supp. 3d 1233, 1239-40 (N.D. Cal. 2019) is wholly misplaced. The portion of that case Meta cites provides no support for the proposition for which it is cited, and instead stands for the unremarkable proposition that "the consequence of a contract ***with an unlawful object*** under California law is that it is void and unenforceable." 417 F. Supp. 3d at 1240. Meta did not even directly argue, much less establish, that BrandTotal's contracts have "an unlawful object." Instead, its argument appears to be that performance on the contract may *involve* breach of Meta's terms of service, which is insufficient to establish illegality for all the reasons explained above.[20]

[20] *Yoo v. Jho*, 147 Cal. App. 4th 1249, 1251 (2007), which dealt with a contract to sell counterfeit goods, and *Shuman v. SquareTrade Inc.*, Case No. 20-cv-02725-JCS, 2020 WL 12894954 at *12

2. Meta Was Not "Justified" in Making False Statements to Google

Meta contends that because it was acting "to enforce its rights" — by which it means enforcing its own-handcrafted ToS – Meta cannot be liable for interference. Dkt. 272 at 25. Meta goes so far as to claim, "the precise wording of the email [to Google] is irrelevant," because it was enforcing its contractual rights and thus allegedly free to say and do anything whatsoever. *Id.* Unsurprisingly, this is not the law. The case on which Meta relies, *SIC Metals, Inc. v. Hyundai Steel Co*., 442 F. Supp. 3d 1251, 1257 (C.D. Cal. 2020), *aff'd*, 838 F. App'x 315 (9th Cir. 2021), makes clear that a justification defense to a claim of interference only applies in the absence of "fraud" or "other means wrongful in themselves." *Quoting Quelimane Co. v. Stewart Title Guaranty Co.*, 19 Cal. 4th 26, 56 (1998) (quoting Restatement 2d of Torts § 766). Here, evidence supports the conclusion that Meta *falsely* represented BrandTotal's programs to Google, meaning Meta *cannot* prove its actions were justified.

Moreover, even if, as Meta contends, BrandTotal must show that Meta engaged in a "sham. . . designed for the specific purpose" of interfering with BrandTotal, Dkt. 272 at 25, this conclusion too may be reached in view of the evidence. Meta contends discovery has produced no evidence that Meta acted with improper purpose of shutting down a competitor, but this is not so. While there is no smoking gun admission—because Meta claimed privilege over a large swath of the investigation—there is certainly circumstantial evidence from which a jury could conclude that Meta's motives were *not* protecting consumers, but instead were anti-competitive in nature. This includes at least the following:

- Meta's ToS state that automated collection is not permitted "without permission" implying that permission would be granted in certain circumstances. Yet, discovery has shown that Meta *never* grants permission for automated collection outside its APIs, even after the FTC Order contemplated such a program. *Supra*, § 2.A.
- Meta deliberately does not make advertising analytics for commercial advertising available, even though it makes that information available for political ads and must

(N.D. Cal. Aug 31, 2020), which merely states the elements of a contract claim, are not on point for the same reason.

separately categorize the ads in order *not* to make the same information available for commercial ads. Ex. G, 33:18–34:5, 94:15–21, 95:13–25; *supra*, § 2.A.

- Meta's "share-of-voice" program provides certain advertising analytics to large advertisers paying to advertise on Facebook, and by design advertisers cannot test the veracity of Meta's assertions. Ex. N, Supp. Resp. to ROG No. 5.
- Meta has faced censure for its misstatements about the reach of advertisements on its platforms, a reach that the analytics would illuminate. Dkt. 268 at 12-13.
- Even the FTC has emphasized the public interest in transparency of targeted commercial advertising (Dkt. 268-20), yet Meta persists.

Again, Meta's motives and overarching scheme is a credibility issue for the jury.

At the end of this section, Meta argues that the email to Google was not fraudulent. Dkt. 272 at 26. Meta previously argued the same to this Court, namely that its statements were accurate due to what this Court called "issues around the margin" (i.e., arguments Meta formulated during litigation about the "participating site" language, lack of consent from advertisers and possible shared computers). Dkt. 158 at 15. This Court found that "[n]one of those theories are necessarily what a reader of the phrase 'improperly scraping user PII (e.g. gender, relationship status, ad interests, etc.), without proper disclosure,' FACC Ex. I, would naturally take it to mean. . . ." *Id*. In the summary judgment brief Meta again tries to argue some of these margin issues make the statement true. However, nothing in the contemporaneous documents obtained since the motion to dismiss hearing suggest Meta "believed" BrandTotal was collecting user PII "without proper disclosure." Rather, the investigation focused [redacted]. Ex. D, 56:22–57:12, 80:16–89:17, 103:19–105:13. The "shared computer" problem and other peripheral issues raised by Meta, did not appear until litigation, as this Court readily appreciated before. What Meta meant, and whether it was true or not, is ultimately a credibility determination and a jury should be able to hear and determine the credibility of Meta's post-hac rationalizations for its email to Google.[21]

[21] For these same reasons, a juror could readily find that Meta's interfering act was "independently wrongful", an element of a prospective interference claim, but not an existing interference claim . Dkt. 272 at 31.

3. A Reasonable Juror Could Find Meta Interfered with BrandTotal's Customer Contracts

Meta argues that because—according to it—the customer contracts are unenforceable, BrandTotal must show the elements for *prospective* economic interference. Dkt. 272 at 26. For the reasons stated above, the contracts are *not* unenforceable hence the relevant inquiry should surround the law of *existing* contract interference. To avoid confusion, however, BrandTotal generally addresses Meta's argument in the order presented.

a. Reasonable Inferences Show Meta Intended to Interfere with BrandTotal's Customer Contracts

Meta claims that "after almost 18 months of litigation, there is no direct evidence that Meta intended to interfere with any contractual relationship." Dkt. 272 at 27. Yet the law does not require "direct evidence"; circumstantial evidence is often the only evidence but more than sufficient to support a jury finding and defeat a motion for summary judgment. *See, e.g.*, *Johnston v. Kimberly-Clark Glob. Sales, LLC*, 542 F. App'x 600, 601–02 (9th Cir. 2013) (finding in the contest of an interference claim that "circumstantial evidence is sufficient for [Plaintiff's] complaint to survive summary judgment"). Ample evidence, circumstantial or otherwise, supports the same conclusion here.

First, Meta contends that it did not know whether Google would respond to its email. Dkt. 272 at 27. But in fact, it did. The evidence shows Meta [redacted] *Supra* § II.C. Even the frequent and conversational tone of the emails shows the close relationship between Meta and Google, Ex. 34 at FB_BRTL_00016961, and supports a jury finding that Meta plainly expected that its correspondence would be acted upon.

Next Meta argues that it did not know that Google removing the extensions would cause BrandTotal harm. Again, this assertion strains credulity. Evidence indicates that Meta [redacted] (e.g., Ex. T at FB_BRTL_00014655; Ex. 40 at FB_BRTL_28694; Ex. S at FB_BRTL_00000053), and Meta concedes it "understood generally that BrandTotal sold competitive marketing analytics." Dkt.

272 at 27. It did not have to know the details of BrandTotal's contracts (like whether there were "particular volume of data" requirements, as mentioned in Meta's brief), in order to know that cutting off the data collecting applications, would harm BrandTotal and interfere with its contracts. See *Altera Corp. v. Clear Logic, Inc*., 424 F.3d 1079, 1092 (9th Cir. 2005)("the defendant need not know exactly who is a party to the contract, so long as he knows he is interfering with a contractual relationship"). Here, Meta knew BrandTotal had contracts, knew it relied heavily on data from Meta to provide analytic services, and it had spoken to advertisers inquiring about BrandTotal. *See* § II.C. A reasonable juror could conclude Meta intended to interfere.

b. The Evidence Supports a Jury Finding that the Disruption to BrandTotal was the Direct Result of Meta's Interference

Meta argues that there is not proximate cause between Meta's actions and the disruption of customer relationships, implying that some long period of time elapsed between the actions and the disruption. Dkt. 272 at 28. This is not the case. After Meta sent the September 21 email, the extensions went down at the beginning of October, and BrandTotal immediately lost access to the UpVoice data stream, and the ability to compensate UpVoice panelists for the time that panelist has spent on social media sites (Facebook and other sites). *See* § II.D. This also compromised the robust analytics services it was able to offer its customers. Ex. H, 154:7–17, 179:10–20, 182:21–183:3 .[22] Over the next several months BrandTotal lost several customers and was forced to [redacted] *Id.* at 159:9–160:16; 162:16–163:20. This was not some "disjointed" remote-in-time event, but directly followed from the actions of Meta as any juror could find. *See* Ex. 49 at BT0002996 ([redacted]

With its summary judgment motion, Meta submits a declaration from a Google employee

[22] Meta argues that BrandTotal had other sources of data (Dkt. 272 at 29), but Meta is well aware that the vast majority of BrandTotal's data came through UpVoice. *Supra* § II.C. Moreover, the fact that a small trickle continued through January 2021 (Dkt. 272 at 29), does not alter the significant impact from the loss of data in October 2020.

that states Google conducted an "independent" investigation of BrandTotal, see Ackerman Decl., and from this Meta argues it was not the cause of Google removing the extensions. Dkt. at 29. This declaration was not provided in advance of summary judgment and BrandTotal did not have a chance to depose this witness on the content of that statement. The assertion of independent investigation in the declaration is belied by the correspondence reflecting a long-standing relationship between Google and Meta (both before and after this case began), [redacted], and the timing of Google's actions (i.e., acting only after Meta's request). A reasonable juror could conclude that Google's investigation was not truly independent, that it relied on Meta, and that it never investigated the BrandTotal business and panelist consent in any meaningful way. Documents produced by Google show [redacted] *Supra* § II.C; Ex. CC. [redacted] (Ex. CC), further supporting the inference that it was Meta's actions, and not some independent Google investigation, that precipitated the harm to BrandTotal. In any event, the credibility and accuracy of the Google witness will be tested at trial and there remains at least a triable issue of fact for a jury.

Meta also contends "external factors" could be the cause of lost customers. Dkt. 272 at 30. Meta notes that 2020 was "turbulent" and cites factors like COVID-19, lack of good customer service, and the litigation itself as possible causes for the customer loss. Dkt. 272 at 30. Yet, BrandTotal identified specific customers and revenue it believes were lost due to the data disruption, and documents produced in discovery support this belief. Ex. 62, §§ 3.2-3.3; Tab 3, Schedule 310; Tab 4, Schedule 410; Tab 5, Schedule 510. Moreover, BrandTotal witnesses testified that [redacted]. Ex. H, 154:7–17, 179:10–20, 182:21–183:3.Whether other factors contributed to the loss of customers is for the jury to decide. Certainly, a reasonable juror could find that it was due to loss of Facebook data, especially when this is reflected by the customer correspondence.

c. The Evidence Supports a Jury Finding that Existing Customer Contracts Were Lost and BrandTotal Damaged by Meta's Actions

Meta claims BrandTotal cannot state a claim for interference with contract because some of the customers on which the damage claim is based chose not to renew their contract, and some of [redacted]. Dkt. 272 at 32. Yet, BrandTotal indisputably had contractual relationships with each of the identified customers, and those relationships were disrupted. *See* Ex. 62, pp. 7-8. Interference with contract, under California law and as also cited by Meta, requires "breach or disruption of the contractual relationship." *See Reeves v. Hanlon*, 33 Cal. 4th 1140, 1148 (2004). That has occurred here. How the disruption played out in each case (i.e., whether the contract was put on hold, or a new contract with credits entered into, etc.) will be relevant to damages, but those details do not establish or deprive BrandTotal of its cause of action.

Ixchel Pharma, LLC v. Biogen, Inc., 9 Cal. 5th 1130, 1147 (2020), cited by Meta, does not hold otherwise. In *Ixchel* a company canceled an at-will joint venture agreement as part of a settlement with another company. The California Supreme Court held that in the case of a claim of interference with an at-will contract, the interference must be independently wrongful. Here the situation is very different. Meta interfered in a way that disrupted existing contracts, and even if some of those agreements could be categorized as "at-will," the actions of Meta were fraudulent and thus, independently wrongful. Neither BrandTotal nor its customers wanted the disruption, and there is more than ample evidence from which a jury could find Meta acted wrongfully.

4. Meta Interfered with UpVoice Panelists and BrandTotal's Google Offerings

Meta's argument that its contracts with Panelists and Google are unlawful fails for the reasons described above. As to the issue of at-will termination, Meta ignores that Google's removal of UpVoice interfered with fully vested, non-terminable contractual obligations—such as

Panelists' entitlement to tokens for past activity. Accordingly, BrandTotal need only satisfy the elements of an interference with contract claim. Regardless, summary judgment is inappropriate under either the intentional interference with contract or IIPEA lens.

Meta's claim that no reasonable factfinder could find that "Meta proximately caused the disruption of any panelist relationships," Dkt. 272 at 34, is groundless. BrandTotal witnesses testified to the takedown's harmful impact on existing panelists and efforts to recruit new ones. Dkt. 26-5 ¶ 26. As to causation, a reasonable jury could plainly find that Meta's inaccurate and misleading communication to Google—which was wrongful for all the reasons stated above—proximately caused this harm.

Meta's suggestion that an interference with contract claim requires specific intent to induce breach, Dkt. 272 at 34, is wrong. *Ixchel*, 9 Cal. 5th at 1148 ("An actionable claim for interference with contractual relations does not require that the defendant have the specific intent to interfere with a contract."). All that is required is knowledge that interference was substantially certain to occur; and a reasonable fact-finder could plainly reach that conclusion here based on Meta's documented cozy relationship with Google, and Meta's investigation into and knowledge of the workings of UpVoice. Indeed, the very document Meta cites as purportedly casting doubt on whether Google would take action also includes language indicating that Meta assumed Google would take action as a matter of course. Ex. 45 [redacted].").

E. Summary Judgment Should Be Denied on BrandTotal's UCL Claim

This Court has already found that the "unfair" prong of the UCL claim is based on BrandTotal's theories of interference. Dkt. 158 at 24. For the reasons set forth above, summary judgment on the UCL claim should thus similarly be denied.

IV. CONCLUSION

For the foregoing reasons, BrandTotal respectfully requests that this Court DENY Meta's motion for summary judgment.

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Date: April 1, 2022

Respectfully submitted,

By: */s/ Rudolph A. Telscher, Jr.*
Rudolph A. Telscher, Jr.*
rudy.telscher@huschblackwell.com
Kara R. Fussner*
kara.fussner@huschblackwell.com
HUSCH BLACKWELL LLP
190 Carondelet Plaza, Suite 600
St. Louis, MO 63105
314-480-1500 Telephone

Ryan B. Hauer*
ryan.hauer@huschblackwell.com
David E. Anderson*
david.anderson@huschblackwell.com
HUSCH BLACKWELL LLP
120 South Riverside Plaza Suite 2200
Chicago, IL 60606
312-655-1500 Telephone

Dustin L. Taylor*
dustin.taylor@huschblackwell.com
HUSCH BLACKWELL LLP
180 1 Wewatta Street, Suite 1000
Denver, CO 80202
303-749-7200 Telephone
*admitted *pro hac vice*

Stephen P. Bosco*
stephen.bosco@huschblackwell.com
HUSCH BLACKWELL LLP
750 17th Street, NW, Suite 900
Washington, DC 20006

202-378-2300 Telephone
Karl Kronenberger (CA Bar No. 226112)
karl@krinternetlaw.com
Jeffrey M. Rosenfeld (CA Bar No. 222187)
jeff@krinternetlaw.com
KRONENBERGER ROSENFELD, LLP
150 Post Street, Suite 520
San Francisco, CA 94108
415-955-1155 Telephone

Attorneys for Defendants/Counterclaim Plaintiffs BrandTotal, Ltd. and Unimania, Inc.

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CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of April 2022, I caused the foregoing to be filed electronically with the Clerk of Court and to be served via email upon all counsel of record at the following:

WILMER CUTLER PICKERING HALE AND DORR LLP
SONAL N. MEHTA (SBN 222086)
sonal.mehta@wilmerhale.com
THOMAS G. SPRANKLING (SBN 294831)
thomas.sprankling@wilmerhale.com
JOSEPH M. LEVY (SBN 329318)
joseph.levy@wilmerhale.com
2600 El Camino Real, Suite 400
Palo Alto, CA 94306
Telephone: (650) 858-6000

ARI HOLTZBLATT
Ari.Holtzblatt@wilmerhale.com
ALLISON SCHULTZ
Allison.Schultz@wilmerhale.com
ROBIN C. BURRELL
robin.burrell@wilmerhale.com
1875 Pennsylvania Ave, NW
Washington, DC 20006
Telephone: (202) 663-6000
Facsimile: (202) 663-6363

CINDY PAN
cindy.pan@wilmerhale.com
250 Greenwich Street
New York, NY 10007
Telephone (212) 937-7275

ANDRES ROSSO O'LAUGHLIN
andy.olaughlin@wilmerhale.com
60 State Street
Boston, MA 02109
Telephone (617) 526-6220

SPENCER LLP
BRANDON L BOXLER
BBoxler@spencerllp.com
6802 Paragon Place, Suite 230
Richmond, VA 23230
Telephone: (804) 285-5236

Attorneys for Plaintiff/Counterclaim Defendant Meta Platforms, Inc.

/s/ Rudolph A. Telscher, Jr.